Nos. 07-1428 and 08-328

In the Supreme Court of the United States

FRANK RICCI, ET AL., Petitioners,

v.

JOHN DESTEFANO, ET AL., Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES AND THE NATIONAL WOMEN'S LAW CENTER, ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether respondents' failure to certify the results of promotional examinations violated the disparate-treatment provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

2. Whether respondents' failure to certify the results of promotional examinations violated 42 U.S.C. § 2000e-2(l), which makes it unlawful for employers "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests of the basis of race."

3. Whether respondents' failure to certify the results of promotional examinations violated the Equal Protection Clause of the Fourteenth Amendment.

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INTEREST OF AMICI CURIAE

The *National Partnership for Women & Families* (The National Partnership) is a non-profit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet the demands of both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, age, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of protected individuals in employment.

The *National Women's Law Center* (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, including in fields that are nontraditional for women, and has promoted voluntary compliance by employers with federal and state civil rights laws. NWLC has prepared or participated in the preparation of numerous *amicus* briefs in cases involving Title VII and the equal protection clause in this Court and in federal circuit courts of appeals.

The National Partnership and the NWLC are joined in filing this brief by 27 other organizations that share a longstanding commitment to civil rights and equality in the workplace for all Americans. The individual organizations are described in the attached appendix.

SUMMARY OF ARGUMENT*

This Court and Congress have long made clear that Title VII prohibits both disparate impact and disparate treatment discrimination as coequal and complementary components of the Civil Rights Act's commitment to equal opportunity in the workplace. Indeed, the disparate impact standard has proven enormously effective in opening doors to employment previously closed to women. Women's entry into the paid firefighting corps, for example, was made possible in large part by disparate impact challenges to a wide variety of recruitment, hiring, and promotion practices that would otherwise likely have remained unexamined and unchanged.

Despite these successes, however, the disparate impact standard's work is not yet done, as women remain substantially underrepresented in firefighting and other traditionally male jobs. Given the persistence of sex discrimination in these fields, employers have a continuing responsibility to monitor their practices for disparate impact and to take action to address such impact when it occurs. If employers are unable to improve on practices that impose an adverse impact, women's access to many jobs will remain limited.

Indeed, New Haven did just what this Court and Congress hoped and expected employers would do in

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* Counsel of record states that the parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity – other than the *amici curiae*, their members, and their counsel – made a monetary contribution to the preparation or submission of this brief.

light of Title VII's prohibition of disparate impact discrimination. The city reacted to findings of its employment practice's severe disparate impact by reconsidering its use of that practice. In light of additional evidence that substantiated the discriminatory inference created by the disparate impact (*e.g.*, evidence of the test's invalidity as well as evidence of less discriminatory alternatives), the city then declined to use that practice. Declining to impose an unlawful disparate impact against some protected class members is not an act of intentional discrimination against others. To the contrary, requiring employers to continue to use a selection device despite knowledge of its disparate impact – or, in the alternative, encouraging employers to remain ignorant of their practices' disparate impact, as petitioners' argument suggests – would frustrate Title VII's fundamental goal of undermining longstanding job segregation and hierarchy.

An employer that declines to use a test that imposes a disparate impact on certain protected classes thus does not engage in disparate treatment in violation of Title VII because it does not intend to treat members of other protected classes differently – nor *does* it treat them differently. Nor does a public employer who declines to use such a test purposefully classify individuals based on protected class status in violation of the equal protection clause. The employer's action itself – the facially neutral decision *not* to use a practice that imposes a disparate impact – is an act of *non*discrimination under both statutory and constitutional standards.

ARGUMENT

I. TITLE VII'S DISPARATE IMPACT STANDARD HAS PROVEN ENORMOUSLY EFFECTIVE IN CHALLENGING EMPLOYER PRACTICES THAT EXCLUDED WOMEN FROM JOBS IN FIREFIGHTING AND ELSEWHERE IN THE PUBLIC AND PRIVATE SECTORS.

Employment practices that impose an unlawful disparate impact – i.e., measures that disproportionately exclude protected class members from job opportunities without adequate justification – frustrate Title VII's objectives in at least two ways. First, employment practices that disproportionately disadvantage women and people of color without any meaningful relationship to successful job performance may sometimes conceal an employer's intent to discriminate. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 426-30 (1971) (observing that employer's non-job-related tests disproportionately excluded African-Americans from jobs that "formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites" and thus operated "to 'freeze' the status quo of prior discriminatory employment practices").

Second, even absent an employer's discriminatory intent, employment practices that impose a disparate impact often reflect unexamined assumptions and stereotypes about the skills and capabilities that predict successful job performance. See *id.* at 431-32 ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to

discriminate on the basis of racial or other impermissible classification. * * * [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability.").

For these reasons, this Court has long held that Title VII prohibits both disparate impact and disparate treatment discrimination as coequal components of the Civil Rights Act's commitment to ensure equal opportunity in the workplace. *Griggs*, 401 U.S. at 431-32 ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.") (emphasis in original); see also *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (emphasizing that Title VII "prohibit[s] all practices in whatever form which create inequality in employment due to discrimination"); *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) ("[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.").

Congress confirmed its intent to prohibit both disparate treatment and disparate impact discrimination as unlawful barriers to equal employment opportunity when it codified Title VII's disparate impact standard in the Civil Rights Act of 1991. See 42 U.S.C. § 2000e-2(k). Congress there made clear its determination to restore a robust

understanding of the disparate impact standard. Finding that "the decision of the Supreme Court in *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections," Congress specifically identified the Act's purposes to include "codify[ing] the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989)." Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 2(2) and 3(2).

Women's persistent exclusion from firefighting and other traditionally male jobs exemplifies the dynamic that Title VII and its disparate impact standard seek to address. See *United Steelworkers of Am.* v. *Weber*, 443 U.S. 193, 208 (1979) (emphasizing Title VII's objective to break down longstanding patterns of segregation and hierarchy). No woman had ever served as a paid firefighter in the United States when Congress extended Title VII's reach to include state and local government employers in 1972. Denise M. Hulett, Marc Bendick, Jr., Sheila Y. Thomas, and Francine Moccio, *Enhancing Women's Inclusion in Firefighting in the USA*, 8 INT'L J. OF DIVERSITY IN ORGANISATIONS, COMMUNITIES, AND NATIONS 189, 191 (2008) (hereinafter "Hulett et al.") (noting that no woman served as a paid firefighter before 1973). Nor did public safety agencies hire women as firefighters in any significant numbers until the 1980s. *Id.* The City of New Haven, for example, did not hire its first woman firefighter until 1983. See Brief of Plaintiff-Appellee at 4, *Broadnax* v. *City of New Haven*, No. 04-2196 (2nd Cir. Aug. 16, 2004). As discussed below,

women's entry into the paid firefighting corps was made possible in large part by disparate impact challenges to a wide variety of recruitment, hiring, and promotion practices that would otherwise have likely remained unexamined and unchanged.

A. Height and Weight Requirements

For example, attention to disparate impact led to the elimination of agencies' height and weight requirements that disproportionately excluded women from a wide range of public safety jobs without any demonstrable connection to successful job performance. See, *e.g.*, *Dothard* v. *Rawlinson*, 433 U.S. 321, 331-32 (1977) (striking down Alabama's height and weight requirements for correctional counselors because they disproportionately excluded women without any showing of job-relatedness); *Costa* v. *Markey*, 706 F.2d 1, 6 (1st Cir. 1982) (police department's height requirement imposed unjustified disparate impact on women in violation of Title VII); *United States* v. *Virginia*, 620 F.2d 1018, 1024 (4th Cir. 1980) (Virginia State Patrol's height and weight requirement disproportionately excluded women without basis in business necessity in violation of Title VII); *Horace* v. *City of Pontiac*, 624 F.2d 765, 768-69 (6th Cir. 1980) (police department's height requirement imposed unjustified disparate impact in violation of Title VII).

B. Physical Ability Tests

Attention to disparate impact also led to changes in employers' physical ability tests that disproportionately excluded women from firefighting and other traditionally male jobs without a proven

connection to workforce quality. To be sure, firefighters and other public safety officers must be strong and fit. But ostensibly neutral physical ability tests have sometimes been designed and implemented as part of a calculated strategy to exclude women. For example, a case study of the Minneapolis Fire Department – now among the nation's leaders in the diversity of its firefighting corps – suggests that its physical ability test was at one time purposefully manipulated to disadvantage women:

> The physical abilities test as part of the process was different every time. Many of the women now on the department are convinced the changes were made in order to keep women out. One woman said, "In our recruit class, instead of actually training, we spent most of our time going through various types of tests. The things the women didn't have trouble with, they'd drop; the things that were harder for women, they'd keep."

International Ass'n of Women in Fire and Emergency Services, *Minneapolis Walks the Walk*, http://www.i-women.org/archive_articles.php (last visited March 18, 2009).

Even absent an intent to discriminate against women, many fire departments' choice of physical ability tests operated to exclude women without any demonstrated connection to successful job performance:

> The remaining 54.2% [of fire departments surveyed] simply use "home grown" tests,

> many of which are ad hoc and reflect little attention to professional standards for test development and validity. For example, some tests reject trainees for slowness in sprinting when many departments forbid sprinting as fatiguing and exacerbating smoke inhalation. Others impose extreme requirements for strength in isolated muscle groups (e.g., an 85 pound bicep curl performed while standing flat against a wall), rather than testing the whole body strength which firefighting involves. Still others test upper body strength, where men typically out-perform women, without measuring stamina and agility, which are also necessary for firefighting and where women often outscore men.

Hulett et al. at 198.

For these reasons, courts in a wide range of jurisdictions have struck down public safety agencies' physical ability tests that disproportionately denied jobs to women without any meaningful relationship to the jobs' actual physical requirements. *E.g.*, *Pietras* v. *Board of Fire Comm'rs*, 180 F.3d 468, 475 (2nd Cir. 1999) (fire department's timed physical agility test that disproportionately excluded women violated Title VII because city failed to prove that the passing score was job-related); *Harless* v. *Duck*, 619 F.2d 611, 616 (6th Cir. 1980) (police department's physical ability test violated Title VII because it disparately impacted women and the city failed to prove that the tested exercises and passing scores were related to the

physical requirements of the job); *United States* v. *City of Erie*, 411 F. Supp. 2d 524, 568-70 (W.D. Pa. 2005) (invalidating police department's physical agility test that disproportionately excluded women as neither job-related nor justified by business necessity); *Thomas* v. *City of Evanston*, 610 F. Supp. 422, 432 (N.D. Ill. 1985) (holding that police department had failed to justify its physical agility test that imposed a disparate impact against women); *Berkman* v. *City of New York*, 536 F. Supp. 177 (E.D.N.Y. 1982) (fire department's physical ability test that disparately impacted women violated Title VII because it was not sufficiently job-related). Courts have also applied the disparate impact standard to strike down physical ability tests that disproportionately excluded women from traditionally male jobs in the private sector without any proven connection to successful job performance. See *Equal Employment Opportunity Comm'n* v. *Dial*, 469 F.3d 735, 743 (8th Cir. 2006) (upholding district court's finding that sausage packing company violated Title VII with its use of a pre-employment strength test that disproportionately excluded women without a demonstrated relationship to safe and effective job performance).

Indeed, the disparate impact standard led to the development of physical ability tests that more accurately screen for qualified firefighters while expanding job opportunities for members of traditionally excluded groups. Over time, for example, Minneapolis' willingness to think more carefully about its physical ability tests led to the development of new selection devices that advanced both merit standards and equal opportunity. In the words of Fire Department Chief Rocco Forte, "There's no reason to lower your standards for diversity. We've actually

raised ours. There was no physical fitness tie to job functions before. People could do sit-ups, but could they perform a rescue?" International Ass'n of Women in Fire and Emergency Services, *Minneapolis Walks the Walk*, http://www.i-women.org/archive_articles.php (last visited March 18, 2009).

C. Other Selection Devices

The disparate impact standard also triggered examination and reconsideration of a wide range of promotion practices and other devices that disproportionately deprived women of job opportunities in public safety jobs without any meaningful tether to successful job performance. For example, the Sixth Circuit found that a police department's use of structured oral interviews as a selection device was "rife with the potential for discrimination and is not job-related" because the practice disparately impacted women without any relationship to actual job performance and was instead subject to a host of errors due to a lack of standardized conditions and objective criteria. *Harless* v. *Duck*, 619 F.2d 611, 616-17 (6th Cir. 1980). The Ninth Circuit similarly held that a sheriff's department's written promotion examination violated Title VII because it disproportionately excluded women without any evidence of business justification. *Bouman* v. *Block*, 940 F.2d 1211, 1227-28 (9th Cir. 1991). A federal district court, furthermore, invalidated Milwaukee's policy of hiring as paramedics only individuals who were also Milwaukee firefighters because that requirement excluded women entirely (no woman had ever been hired as a Milwaukee firefighter) without a showing of business necessity (paramedics "seldom, if ever, perform firefighting duties (and are never relied upon to extinguish fires) during their

regular work week"). *United States* v. *City of Milwaukee*, 481 F. Supp. 1162, 1164-65 (E.D. Wis. 1979). And the U.S. Equal Employment Opportunity Commission recently found that the Houston Fire Department's implementation of new promotional rules – which grant significant advantage to those firefighters with tenures longer than ten years – had an unlawful disparate impact upon women. L.M. Sixel, *They Want To Climb Fire Ladder, But Can't*, HOUSTON CHRONICLE, Jan. 4, 2008, available at http://www.chron.com/disp/story.mpl/moms/5427037.html (last visited March 23, 2009).

D. On-the-Job Working Conditions

By enabling challenges to working conditions that disproportionately disadvantage women once they achieve entry into traditionally male fields, Title VII's disparate impact standard helps women stay in these jobs and further break down patterns of occupational segregation. See, *e.g.*, *DeClue* v. *Central Illinois Light Co.*, 223 F.3d 434, 436 (7th Cir. 2000) (observing that a utility's failure to provide restrooms to its employees disproportionately deters women from certain jobs without any basis in business necessity); *Lynch* v. *Freeman*, 817 F.2d 380, 388-89 (6th Cir. 1987) (construction company's practice of providing unsanitary portable toilets for employees imposed a disparate impact against women without any evidence of business necessity); *Johnson* v. *AK Steel Corp.*, No. 1:07-cv-291, 2008 WL 2184230, at *8 (S.D. Ohio May 23, 2008) (concluding "that the practice of requiring women to urinate off the side of a crane in lieu of restroom breaks, if true, would have a significant discriminatory impact on women"); *James* v. *National*

R.R. Passenger Corp., No. 02-cv-3915, 2005 WL 6182322 at *5-6 (S.D.N.Y. March 28, 2005) (upholding jury verdict that employer's provision of employee bathrooms with no privacy and poor sanitary conditions violated Title VII because it disparately impacted women without any basis in business necessity); *Pumphrey* v. *City of Coeur D'Alene*, No. 92-36748, 1994 U.S. App. LEXIS 3892, at *2 (9th Cir. Feb. 24, 1994) (reversing summary judgment on woman police officer's claim that large-gripped firearm had unlawful disparate impact on women because their hands are, on average, smaller than men's).

By requiring careful examination of employment practices that impose a disparate impact on protected class members, Title VII thus enhances not only equal access to job opportunities, but also a commitment to true merit selection. As this Court has observed, "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance." *Griggs*, 401 U.S. at 437; see also *Thomas* v. *City of Evanston*, 610 F. Supp. 422, 432 (N.D. Ill. 1985) ("Too often tests which on the surface appear objective and scientific turn out to be based on ingrained stereotypes and speculative assumptions about what is 'necessary' to the job. Thus, tests which discriminate against protected groups must be thoroughly documented and validated in order to minimize the risk of unwarranted discrimination against groups which have been traditionally frozen out of the work force."). Moreover, the disparate impact theory appropriately enables regular

assessment of whether workplace conditions – especially those in male-dominated jobs – continue to block women's employment opportunities.

II. PERSISTENT BARRIERS TO EQUAL EMPLOYMENT OPPORTUNITY WILL REMAIN UNADDRESSED UNLESS EMPLOYERS CAN IDENTIFY AND CORRECT THEIR EMPLOYMENT PRACTICES' DISPARATE IMPACT.

As described above, the disparate impact standard made possible challenges – and changes – to a wide variety of recruitment, selection, and promotion practices that had previously excluded women from firefighting and other traditionally male jobs. Yet the disparate impact standard's work is not yet done, as women remain substantially underrepresented in firefighting and elsewhere. For example, women currently comprise only 3.7% of the approximately 350,000 paid firefighters in the United States. Hulett et al. at 191. Firefighting thus falls in the lowest 11th percentile of occupations nationwide in terms of its proportion of women employees. *Id.* Census data, moreover, indicates that approximately half of all fire departments nationwide had no women firefighters as of 2000. See *id.* Indeed, the most recent available data demonstrates that the New Haven Fire Department employs only one woman among its 86 full-time supervisory firefighting positions (comprised of the fire chief, inspectors, captains, and lieutenants) and only ten women out of its 240 full-time rank-and-file firefighters. See City of New Haven, State & Local Gov't Info Report EEO-4 (2007).

A 2008 study, furthermore, calculated that women's representation in the qualified labor pool (i.e., the

number of women with high school degrees currently employed at least 35 hours a week in occupations that require strength, stamina, and dexterity and/or outdoor, dangerous, or dirty work – such as bus mechanics, enlisted military personnel, highway maintenance workers, loggers, professional athletes, welders, roofers) indicates that they should be expected to comprise 17% of all firefighters today. Hulett et al. at 193. The authors concluded that fire departments thus employ women at only 21.8% of their expected representation. *Id.* Women of color face double disadvantage, comprising only .8% of all paid firefighters, compared to an expected representation of 5.9%. *Id.* at 195. The actual representation of women of color in paid firefighting is thus only 13.6% of their expected representation (a representation rate less than half that of white women's 26% actual-to-expected representation ratio). *Id.* Overall, at current rates of change, the authors estimate that women's actual representation in the paid firefighting corps will not match their expected representation (of at least 17%) for another 72 years. *Id.* at 196.

Such substantial underrepresentation is likely due at least in part to the persistence of systemic discrimination, rather than women's lack of interest. That many women are interested in and qualified for firefighting jobs is further demonstrated by the significant number of women employed by certain departments. 2000 Census data, for example, indicate that the following fire departments employ significant proportions of women firefighters: Tuscaloosa, Alabama (women make up 24% of the city's firefighters); Kalamazoo, Michigan (23%); Springfield, Illinois (19%); Racine, Wisconsin (18%); Minneapolis, Minnesota (17%); Redding, California (17%); Madison,

Wisconsin (15%); San Francisco, California (15%); Anchorage, Alaska (14%); Boulder, Colorado (14%), Miami-Dade, Florida (13%); Allentown-Bethlehem-Evanston, Pennsylvania (12%); Sarasota, Florida (12%); and Jacksonville, Florida (11%). *Id.* at 191-92. Indeed, firefighting and other public safety jobs are unusually attractive because they offer quality pay, benefits, job security, pensions, and prestige while generally requiring no education or work experience other than a high school diploma. See *id.* at 190-91. For example, firefighters in 2005 earned an average hourly wage of $19.42, a wage 22.4% higher than that received by the average blue-collar worker. *Id.* Firefighters, moreover, received 64 cents in fringe benefits for every dollar of wages earned – a benefits rate almost double that earned by private–sector service workers. *Id.* at 190. In addition, firefighters often receive half-pay pension for life after 25 years of service, and frequently enjoy a large number of off-duty hours that permit second jobs with additional earnings capacity. *Id.*

Women in firefighting continue to face intentional sex discrimination as well, further contributing to their underrepresentation. Women firefighters report sex discrimination on the job at a rate nearly seven times that of their male counterparts (nearly 85% of women firefighters reported that "I have experienced different treatment because of my gender" compared to 12% of their male counterparts). *Id.* at 192-93. For example, a jury recently found the New Haven Fire Department liable for engaging in intentional sex discrimination against one of its women firefighters, and awarded the plaintiff nearly $1.5 million in damages for her Title VII, equal protection, and First Amendment claims).

See *Broadnax* v. *City of New Haven*, 415 F.3d 265 (2nd Cir. 2005).

Intentional sex discrimination against women firefighters is by no means unique to New Haven. See also *Wedow* v. *City of Kansas City*, 442 F.3d 661, 671-72 (8th Cir. 2006) (failure to provide adequate firehouse bathroom facilities and properly-fitting safety gear is unlawful adverse action under Title VII); Meredith Mandell, *New Jersey Woman Settles Discrimination Lawsuit*, HERALD NEWS, Sept. 9, 2008, available at http://cms.firehouse.com/content/article/article.jsp (last visited on March 23, 2009) ($450,000 settlement of federal lawsuit in which woman firefighter alleged hostile work environment, including "that fellow firefighters taunted her, intimidated her, failed to promote her and failed to pay her overtime," and perpetuated rumors she was sleeping with her supervisor); Jessica Garrison, *Firefighter in L.A. Wins $6.2 Million in Bias Suit*, L.A. TIMES, July 5, 2007 ($6.2 million jury verdict for African American woman firefighter on claims of sexual harassment, discrimination, and retaliation); Tony Plohetski & Kate Alexander, *Austin Officials: Female Firefighter's Locker Defaced*, AUSTIN AMERICAN-STATESMAN, Jan. 10, 2007 (reporting female firefighter's locker smeared with human excrement, and her shampoo bottle filled with urine); Art Marroquin, *Audit Finds Harassment, Discrimination Still Plague LAFD*, CITY NEWS SERVICE, Jan. 27, 2006, available at http://cms.firehouse.com/content/article/article.jsp (last visited on March 23, 2009) (summarizing report by Los Angeles Controller finding that "a culture of discrimination, harassment and hazing against women and minorities still plagues the [city's] Fire Department").

Women's substantial underrepresentation in good jobs in fields with longstanding histories of sex discrimination thus suggests continuing systemic barriers to equal opportunity that are unlikely to be eliminated absent the use of tools like the disparate impact standard. For these reasons, employers like New Haven should remain concerned by and suspicious of tests and other employment practices that disproportionately disadvantage protected class members. Indeed, New Haven did just what this Court and Congress hoped and expected employers would do in light of Title VII's prohibition of disparate impact discrimination. It reacted to findings of its employment practice's severe disparate impact by reconsidering its use of that practice. In light of additional evidence that substantiated the discriminatory inference created by the disparate impact (*e.g.*, evidence of the test's invalidity as well as evidence of less discriminatory alternatives), the city then declined to use that practice.

III. THE CITY OF NEW HAVEN NEITHER ENGAGED IN DISPARATE TREATMENT OF PROTECTED CLASS MEMBERS IN VIOLATION OF TITLE VII, NOR DID IT CLASSIFY INDIVIDUALS BASED ON PROTECTED CLASS STATUS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

An employer that acts as New Haven did in this case thus does not engage in unlawful disparate treatment against others because it does not intend to treat members of other protected classes differently – nor *does* it treat them differently. To the contrary, that employer acts entirely consistently with Congress' intent to achieve compliance with both the disparate

treatment and disparate impact prohibitions through voluntary employer action, recognizing that employers are especially well-positioned to evaluate their own employment needs as well as the availability of less discriminatory alternatives. See *United Steelworkers of Am.* v. *Weber*, 443 U.S. 193, 206-08 (1979) (emphasizing Congress' intent to ensure equal employment opportunity while preserving management prerogatives); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975) (same); *Johnson* v. *Transportation Agency*, 480 U.S. 616, 641-43 (1987) (emphasizing that Title VII seeks to encourage employers' voluntary efforts to identify and prevent discrimination). Indeed, requiring an employer to continue to use a selection device despite knowledge of its disparate impact – or, in the alternative, encouraging an employer to remain ignorant of its practices' disparate impact, as petitioners' argument suggests – would frustrate Title VII's effort to undermine traditional patterns of segregation and hierarchy. See *Weber*, 443 U.S. at 209.

Nor did New Haven engage in purposeful discrimination against other protected class members that triggers heightened levels of scrutiny under the equal protection clause. Purposeful discrimination for equal protection purposes requires that the decisionmaker acted "because of" – and not merely "in spite of" – the act's adverse consequences for protected class members. *Personnel Admin'r of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979); see also *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2792 (2007) (Kennedy, J., concurring) ("[A] constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races"). New

Haven's actions are instead acts of *non*discrimination under both statutory and constitutional standards.

In the alternative, even if this Court applies heightened scrutiny to a governmental employer's attempt to avoid imposing an unlawful disparate impact, New Haven's action should survive any type of heightened scrutiny because it was necessary to achieving its compelling interest in complying with a federal statute. To be sure, New Haven's interest in complying with a Congressional mandate (as well as this Court's longstanding precedent) is required by the Supremacy Clause. This interest takes on an even more compelling quality with respect to a federal law that is dedicated to ensuring equal opportunity in the workplace.

CONCLUSION

For these reasons, the judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

9to5, National Association of Working Women is a national membership organization of low-wage women founded in 1973 to achieve workplace equity for women. 9to5 engages low-wage women in speaking out to improve corporate and public policies that create good jobs with family-flexible policies, combat discrimination, and strengthen the safety net for low-income families. 9to5 talks to thousands of women and employers annually, on our Job Survival Helpline and through our training programs, about job discrimination and other workplace issues. We believe that limiting the ability of employers to voluntarily remedy discriminatory policies and practices against women will severely exacerbate gender-based workplace inequities.

For over 125 years, the *American Association of University Women* (AAUW) has been a catalyst for the advancement of women and their transformation of American society. AAUW's more than 100,000 members belong to a community that breaks through educational and economic barriers so all women have a fair chance. With more than 1,300 branches across the country, AAUW works to promote equity for all women and girls through education, research, and advocacy. AAUW supports civil rights laws such as Title VII that protect women and other minorities from workplace discrimination and lower the potential for incidents of disparate impact against women and other protected classes. AAUW further supports the ability of

employers to pursue voluntary remedies to discriminatory workplace policies.

The *American Nurses Association* ("ANA") was founded over a century ago, and today it represents the interests of the Nation's 2.9 million registered nurses. The ANA is comprised of 51 constituent member associations, with RN members in every state of the United States and the District of Columbia. ANA has approximately 180,000 members. In addition, there are 23 specialty nursing organizations that are Organizational Affiliates of the ANA and that have a combined, additional membership of approximately 330,000 RNs. ANA not only develops the Code of Ethics for Nurses and the standards of nursing practice, it actively promotes patient safety, workplace rights, appropriate staffing, workplace and environmental health and safety, and the public health. Fundamentally, ANA supports the ability of employers to proactively correct practices that have a discriminatory impact on employees, because such an approach is consistent with the intent of federal laws.

A Better Balance is a non-profit organization that seeks to promote equality and expand choices for men and women at all income levels so they may care for their families without sacrificing their economic security. Since 2005, A Better Balance has employed a range of legal strategies to promote flexible workplace policies, end discrimination against caregivers and value the work of caring for families. A Better Balance is committed to advancing equality in employment for people with family responsibilities and we champion Title VII and the theory of disparate impact as critical tools for combating discrimination against caregivers, especially mothers, in the workplace.

The *Coalition of Labor Union Women* (CLUW) is an AFL-CIO affiliate with over 20,000 members located throughout the United States, a majority of who are women. Since 1974, CLUW has advocated to strengthen the role and impact of women and people of color in every aspect of their lives. CLUW focuses on key public policy issues such as equality in educational and employment opportunities, affirmative action, pay equity, national health care, labor law reform, family and medical leave, reproductive freedom and increased participation of women in unions and in politics. Through its more than 80 chapters across the United States, CLUW members work to end discriminatory laws, and policies and practices adversely affecting women and workers of color, through a broad range of educational, political and advocacy activities. CLUW has frequently participated as *amicus curiae* in numerous legal cases involving issues of gender and race discrimination and pay equity. CLUW provides training and educational support to its members on issues relating to Title VII enforcement and prevention of workplace harassment and discrimination and encourages adoption of policies and programs that encourage voluntary remedial efforts to eliminate policies that permit or perpetuate employment discrimination against women and people of color.

Connecticut NOW is the state chapter of the National Organization for Women, a multi-issue organization devoted to the elimination of all forms of discrimination against women. We work for the personal, professional, and political empowerment of women in our state. Our 2009 priority areas are media and financial literacy, public financing of

elections/electing women to office, and women's health and safety. We sign on to this amicus brief because of our focus on women's professional empowerment, which is impossible if sex discrimination is not eliminated from Connecticut's workplaces.

The *Feminist Majority Foundation* (the Foundation), is a non-profit organization with offices in Arlington, VA and Los Angeles, CA. The Foundation is dedicated to eliminating sex discrimination and to the promotion of women's equality and empowerment. The Foundation's programs focus on advancing the legal, social, economic, and political equality of women with men, countering the backlash to women's advancement, and recruiting and training young feminists to encourage future leadership for the feminist movement. To carry out these aims, the Foundation engages in research and public policy development, public education programs, litigation, grassroots organizing efforts, and leadership training programs.

Greater New Haven NOW is the local (New Haven County) chapter of the National Organization for Women, a multi-issue organization devoted to the elimination of all forms of discrimination against women. Recent activities of our chapter have focused on peace, violence against women, human rights, sexual harassment in the workplace, and women's history. In addition to our public policy work, we provide advice and support to individual women who contact us with horror stories about sexism and violence in their own lives. Recent cases include workplace discrimination, divorce, domestic violence, and unsafe streets. We sign on to this amicus brief because we know that employers do not always comply

with Title VII and because we fear that, if Mayor DeStefano loses this case, it will set back his and our efforts to eliminate sex discrimination from the workplaces in Greater New Haven.

The *International Association of Women in Fire & Emergency Services* is in support of the City of New Haven. Firefighting as a career for young women is not perceived to be the norm, in large part because the job is perceived to be about fighting fire, when in reality 60 to 80% of emergency calls are for medical emergencies (depending on the department). Whereas non-traditional careers such as the military, law enforcement, and construction trades have on average 17% women, the fire service measures in at under 4%. The prognosis for the future is not good unless the fire service takes proactive steps to solve the disparity. Local municipalities need to have the ability to remedy discrimination in a number of areas including hiring, retention, and promotions to enable our local fire departments to be more representative of the communities we serve.

Legal Momentum (formerly NOW Legal Defense and Education Fund) has worked to advance women's rights for nearly forty years. One priority for Legal Momentum is assuring equal employment opportunity for women in historically male-dominated fields, such as firefighting, law enforcement, and the construction trades. Legal Momentum advocates in the courts and with policymakers to promote women's access to these jobs. Legal Momentum also litigates cases and participates as *amicus curiae* to combat sex discrimination and to promote affirmative action to correct longstanding discriminatory practices. Many

policies and practices in male-dominated jobs fall more heavily on women – from outdated physical entrance exams that do not correlate with job duties, to lack of adequate restroom facilities, to light-duty policies that do not accommodate pregnancy. It is thus imperative that the law permit employers broad latitude to identify and correct such disparate impact.

The *Myra Sadker Foundation* is a non-profit organization dedicated to promoting equity in and beyond schools. By working to eliminate gender bias, the Foundation enhances the academic, psychological, economic and physical potential of America's children. The Foundation supports research, training and special programs for teachers, parents, children and all those whose work and interests touch the lives of children. As part of this goal, the foundation opposes unfair testing and assessment policies and practices.

The *National Alliance for Partnerships in Equity* (NAPE) is a consortium of state and local education and workforce development agencies who have joined forces to work collaboratively to promote equity in education and workforce development programs. NAPE's membership is committed to the creation of equitable classrooms and workplaces where there are no barriers to opportunities, including workplace discrimination. We support the work being done by the National Partnership for Women and Families and the National Women's Law Center on this case to ensure that women who have chosen to pursue a nontraditional career do not have to face discrimination either in the hiring process or in the workplace.

The *National Association of Commissions for Women* (NACW) serves as the professional organization for Commissions for Women across the country. Some 200+ women's commissions exist, each working towards equality and equity for women in their cities, counties and states. It is in this spirit of equality and equity that NACW wishes to support the amicus brief in the case of *Ricci v. DeStefano.* Women continue to face institutional discrimination in a large number of arenas. While Title VII was passed to eliminate such barriers, our experience has been that these discriminatory practices continue to exist and, in some cases, to flourish. It is crucial to our fundamental beliefs in democracy that Title VII be enforced and that employers recognize employer's obligation and duty to remedy discrimination wherever and whenever it occurs. Sex discrimination cannot be tolerated nor encouraged.

The *National Association of Women Lawyers* is the oldest women's bar association in the United States. NAWL's members include individuals and organizations. Headquartered in Chicago, the organization is over one hundred years old. NAWL works to advance the interests of women in and under the law and to eliminate violence and discrimination against women. NAWL acts as amicus curiae and advises legislators and policymakers. NAWL has an interest in achieving and maintaining workplace equality for all.

A division of the Feminist Majority Foundation, the *National Center for Women and Policing* (NCWP), promotes increasing the numbers of women at all

ranks of law enforcement as a strategy to improve police response to violence against women, reduce police brutality and excessive force, and strengthen community policing reforms. Many of the issues that this brief will address, particularly those dealing with discriminatory hiring policies, relate directly to our work at the Center. We are excited to join with the National Women's Law Center on this case to work to ensure that employers are never legally permitted to implement hiring policies that have a disparately negative impact on women.

The *National Council of Jewish Women* (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles and Resolutions state that "equal rights and equal opportunities for women must be granted" and the organization endorses and resolves to work for "the enactment and enforcement of laws and regulations that protect civil rights and individual liberties for all." Consistent with our Principles and Resolutions, NCJW joins this brief.

The National Employment Law Project (NELP) works to restore the promise of economic opportunity in the 21st century job market. In partnership with national, state and local allies, we promote policies and programs that create good jobs, strengthen upward mobility, enforce hard-won worker rights, and help unemployed workers regain their economic footing through improved benefits and services. Central to the

promise of a good job and economic opportunity is a workplace and workforce that is free from illegal discrimination. When employers are denied the tools they need to fight discrimination, both institutional and intentional, within their workplaces, all workers suffer. NELP is concerned with eradicating all forms of illegal discrimination and providing employers, workers and their advocates all tools available to remedy and eliminate invidious discrimination.

The *National Organization for Women Foundation* is a 501 (C) (3) entity, founded in 1987, to further the rights of women through education and litigation. It is affiliated with the National Organization for Women which is the nation's largest feminist activist organization, with chapters in every major city and in all 50 states and in Washington, D.C. Since its founding in 1966, NOW has been committed to the full enforcement of both Title VII and the Equal Protection Clause, and has engaged in litigation in furtherance of their enforcement.

The *Northwest Women's Law Center* (NWWLC) is a non-profit public interest legal organization that works to advance the legal rights of women in the Pacific Northwest through litigation, education, legislative advocacy, and the provision of legal information and referral services. Since its founding in 1978, the NWWLC has been dedicated to protecting and securing equal rights for women and their families, including in the workplace, in educational institutions, and elsewhere. Toward that end, the NWWLC has participated as counsel and as amicus curiae in cases throughout the Northwest and the country, including numerous cases establishing women's rights to work

free from sex discrimination and sexual harassment. The Law Center continues to serve as a regional expert and leading advocate in litigation and in legislative efforts to protect equal opportunity in the workplace.

Oregon Tradeswomen, Inc. works to promote the success of women in the trades by training women for apprenticeship, supporting current tradeswomen and educating the next generation. We are interested in assuring that government has all tools available to remedy discrimination, particularly in areas where there has been occupational segregation by gender.

The *Sargent Shriver National Center on Poverty Law* (Shriver Center) champions economic opportunity through fair laws and policies so that people can move out of poverty permanently. Our methods blend advocacy, communication, and strategic leadership on issues affecting people living in poverty. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communities building strategic alliances. Through its Women's Law and Policy Project, the Shriver Center works on issues related to women's employment and economic security. Discriminatory workplace policies and practices have a negative impact on women's immediate and long-term economic security. Non-discrimination in employment is the surest path out of poverty and toward economic well-being. The Shriver Center has a strong interest in the eradication of unfair and unjust employment policies and practices, including access to family-sustaining employment, which serve as a barrier to economic equity.

Sociologists for Women in Society is an organization of professional sociologists who are committed to improving the situation of women in the academy and in the broader society. Many of us do research documenting the existence of gender biases at work and identifying common mechanisms by which gender biases are intentionally and unintentionally perpetuated. We work to share the findings of this sociological research with students, colleagues, and members of our communities.

The *Southwest Women's Law Center* is a nonprofit women's legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by eliminating gender discrimination, helping to lift women and their families out of poverty, and ensuring that women have control over their reproductive lives. The Southwest Women's Law Center is committed to eliminating gender discrimination in all of its forms and ensuring broad and meaningful enforcement of anti-discrimination laws and constitutional prohibitions on sex discrimination.

The *Women & Politics Institute at American University* is dedicated to the educational advancement of young women to prepare them for positions of leadership in the economic sphere. The Institute offers more courses on women's issues than any other university in the United States and offers a specialized certificate in Women, Policy, and Political Leadership. As such, the Institute is very concerned with opportunities for women in the workplace. The use of discriminatory tests limits women's access to a number of professions

and would reverse decades of progress toward equality in the workforce.

Women Employed is a national organization based in Chicago whose mission is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has fought to outlaw pay discrimination, pregnancy discrimination and sexual harassment and to strengthen federal equal opportunity policies and work/family benefits. Women Employed strongly supports the ability of employers to take steps to rectify discriminatory policies and practices against women.

The *Women's Law Project* (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. The WLP has a strong interest in the proper application of civil rights laws to provide appropriate and necessary redress to individuals victimized by discrimination.

The *Women's Sports Foundation* is a 501(c)3 nonprofit educational organization dedicated to advancing the lives of girls and women through sports and physical activity and ensuring equal participation and leadership opportunities for girls and women in sports and fitness. The Foundation distributes over 2 million

pieces of educational information each year, awards grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquiries a year concerning Title IX and women's sports issues, and administers awards programs to increase public awareness about the achievements of women in sports.